

June 29, 2010

House of Representatives Committee on Judiciary  
521 House Office Building  
Lansing, Michigan

**RE: COMMENTS IN OPPOSITION TO HOUSE BILL NO. 5750  
FROM A LEGAL PERSPECTIVE**

Dear Sirs/Madams:

This firm represents the Michigan Association of Broadcasters. For the following reasons, the Michigan statute regulating non-compete agreements that was enacted in 1985 (MCL 445.774a) provides ample protection to all broadcast industry employees. Therefore, no sound reason exists to afford them any special, favored treatment and the amendments to that statute proposed in House Bill No. 5750 are completely unnecessary.

1. *Michigan already has a statute in place that regulates non-compete agreements for all employees in all industries, including all employees working in the broadcast industry. It is equitable and fair to both employers and employees and does not favor either. Therefore, the amendments to that statute via HB 5750 are completely unnecessary.*

- Seven of the eight states which have enacted statutory restrictions on broadcast industry non-compete agreements are unlike Michigan and do not have a statute regulating non-compete agreements that is applicable to all employees in the state.

2. *The existing Michigan statute regulating non-compete agreements already offers substantial protection to broadcast industry employees and requires non-compete agreements to be reasonable in all aspects to be enforceable.*

A. Non-compete agreements are not enforceable unless they are narrowly designed to protect an “employer’s reasonable competitive business interests.”

- Michigan courts have refused to enforce non-compete terms whose only object is to prevent competition.
- House Bill No. 5750 recognizes that it is reasonable for Michigan broadcasters to restrict certain employees, such as those in sales and management positions, from being employed with their competitors. There is no sound justification for treating some broadcast industry employees differently.
- A federal court in Michigan has ruled that a broadcaster could enforce a reasonable non-compete agreement against an on-air performer to protect its business goodwill built by promoting the performer and his show; the federal court ruled that the business goodwill was a “reasonable competitive business interest” that was entitled to protection under the existing Michigan statute.

B. The non-compete agreement must be reasonable in terms of the type of employment restricted.

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- For example, while it may be reasonable under the current statute to restrict an on-air performer with respect to a similar on-air position with a competitor, it may not be reasonable to attempt to restrict that person from accepting a sales or managerial position with the same competitor. Michigan courts have refused to enforce non-compete terms that are unreasonably broad in terms of the type of employment affected.
- C. The non-compete agreement must be reasonable in terms of duration
- What is a reasonable duration varies with the particular facts and circumstances of each case and Michigan courts have not hesitated to refuse to enforce non-compete restrictions considered to be too long.
- D. The non-compete agreement must be reasonable in terms of geographic scope
- What is a reasonable geographic scope also varies with the circumstances but, in the case of on-air talent, courts typically refuse to enforce geographic terms that extend beyond the particular broadcast market or the area of the broadcast signal in which the employee worked.
- E. The current statute expressly empowers the courts to modify and limit terms in a non-compete agreement if the court determines any of them to be unreasonable.
- This affords yet another measure of protection to all employees, including those in broadcasting.

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3. *Broadcasters (and other employers) usually attempt to enforce non-compete agreements by requests to the courts for temporary restraining orders and/or requests for preliminary injunctive relief; that type of relief is very difficult to obtain and affords additional protection to broadcast industry employees.*
- A. The broadcaster/employer must show that it is likely to prevail on the merits, i.e. that it is likely to ultimately win the case;
  - B. The broadcaster/employer must also show that it will suffer irreparable harm if injunctive relief is not granted and that monetary damages will be an insufficient remedy;
  - C. The court must weigh whether the harm to the broadcaster/employer if preliminary injunctive relief is not granted outweighs the potential harm to the former employee if injunctive relief is granted; and
  - D. The court must consider any harm to the public interest if injunctive relief is granted.
  - E. Also, legal fees incurred in pursuing injunctive relief may be substantial which causes some broadcasters/employers to decide against even attempting to enforce non-compete agreements. Therefore, the argument by some employees that they can't afford legal fees incurred in a dispute over the enforcement of a non-compete agreement applies to broadcasters as well.

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4. *If it ain't broke, don't fix it!*

A. There are no reported decisions in Michigan involving lawsuits initiated by broadcast industry employees who have asked courts to declare their non-compete terms unreasonable and thus invalid and unenforceable.

- This indicates that broadcasters have self-policed and have adhered to the current statute's mandate that all aspects of non-compete agreements must be reasonable or they will not be enforced by the Courts.

B. There are very few reported decisions in Michigan involving attempts by broadcasters/employers to enforce non-compete agreements and none in which terms of non-compete agreements have been adjudged to be unreasonable and thus unenforceable.

- This is additional evidence that the use of non-compete agreements in the broadcast industry does not require special scrutiny.

5. *HB 5750 exhibits internal inconsistency.*

A. It presumes that non-compete agreements can never be reasonable for on-air employees in the broadcast industry, although it implicitly acknowledges that they can be reasonable for all sales and managerial employees in the broadcast industry and for all employees in all other industries.

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- B. It completely distrusts the Courts: (1) to properly determine whether or not the terms of a non-compete agreement for some broadcast industry employees are reasonable and thus enforceable; and (2) to properly apply the well-established and very stringent criteria in deciding the propriety of granting injunctive relief as to those employees. Yet, it continues to trust the Courts to make those decisions for all sales and managerial employees in the broadcast industry and all other employees in all other industries.

Respectfully submitted

  
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